STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN DEPARTMENT OF NATURAL RESOURCES, Plaintiff-Appellee, v CARMODY-LAHTI REAL ESTATE, INC., Defendant-Appellant.	UNPUBLISHED June 3, 2003 No. 240908 Houghton Circuit Court LC No. 97-010318-PZ

Before: Smolenski, P.J., and Griffin and O'Connell, JJ.

PER CURIAM.

In this property action, defendant Carmody-Lahti Real Estate, Inc, appeals as of right from the trial court's April 5, 2002 order granting summary disposition in favor of plaintiff Michigan Department of Natural Resources. Defendant contends that the trial court erred in determining that the easement was not extinguished when it ceased to be used by the Soo Line Railroad ["Soo Line"] for railroad purposes, or as a result of Soo Line's other actions and words.

The piece of property at issue in this case is a thirty-foot strip of land which was previously used by Soo Line for operation of its railroad and is adjacent to defendant's property, where it maintains a residential apartment complex. By the early-1980's, Soo Line had ceased using the easement for railroad purposes and sold a portion of the easement to plaintiff in February 1988, who used it as a snowmobile trail. In 1997, defendant erected a fence which blocked the snowmobile trail, and litigation ensued when plaintiff filed its complaint on December 1, 1997. Plaintiff sought an injunctive order enjoining defendant from maintaining the fence.

This case has once before been before this Court. *Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, unpublished opinion per curiam of the Court of Appeals, issued May 31, 2001 (Docket No. 222645). We determined that the conveyance from Soo Line to plaintiff granted an easement not a fee, and remanded the case to the trial court for consideration of whether the easement had been extinguished by abandonment or a tax sale.[1] Plaintiff then moved for summary disposition pursuant to MCR 2.116(C)(10). The trial court determined that

[1] The parties later abandoned the tax sale argument. Therefore, the trial court did not consider it and it is not an issue on appeal.

Soo Line had not abandoned its property rights in the easement and thus, plaintiff had a valid property interest. Defendant appeals as of right. We affirm.

Summary disposition of all or part of a claim or defense may be granted when

> [e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. [MCR 2.116(C)(10).]

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). A motion for summary disposition based on the lack of a material factual dispute must be supported by documentary evidence. MCR 2.116(G)(3)(b), *Meyer v City of Center Line*, 242 Mich App 560, 574; 619 NW2d 182 (2000).

On appeal, a trial court's grant or denial of summary disposition will be reviewed de novo. *Spiek, supra* at 337. Review is limited to the evidence which had been presented to the trial court at the time the motion was decided. *Sprague v Farmer's Ins Exch*, 251 Mich App 260, 265; 650 NW2d 374 (2002).

The first determination that must be made is whether Soo Line's cessation of rail service operations automatically extinguished the easement. The original 1873 deed stated that the Quincy Mining Company conveyed "a right of way for the railroad of [the Mineral Range Railroad]," Soo Line's original predecessor in interest.[2] Defendant contends that this language limited the easement to railroad purposes only. Thus, Soo Line's non-use of the easement for such purpose and sale to plaintiff, a non-railroad entity, for non-railroad purposes extinguished the easement. Therefore, defendant concludes that Soo Line had no valid interest to transfer to plaintiff.

The trial court relied on *Quinn v Pere Marquette R Co*, 256 Mich 143; 239 NW 376 (1931), to support its determination that there was no limitation on the easement's use because the deed contained no reverter clause. In *Quinn*, the Court first had to decide if the grant of the land conveyed was a fee or an easement. *Id*. at 150. Having decided that the conveyance was of a fee, the Court then had to determine the character of the fee. The Court held that "where there is no reverter clause, a statement of use is merely a declaration of the purpose of the conveyance, without effect to limit the grant." *Id*. at 151.

In this case, this Court has already determined that the conveyance in the 1873 deed was of an easement. *Carmody-Lahti, supra*. Defendant argues that because the *Quinn* Court's

[2] Contrary to defendant's statement in its appellate brief, the reservation clause in the 1873 deed did not contain the phrase "for railroad purposes." The reservation clause stated that the Quincy Mining Company reserved mineral rights in portions of the "right of way for said railroad surveyed and located as aforesaid …."

discussion of a reverter clause involved a fee, it is inapplicable in this case. However, defendant ignores other Michigan case law. In *MacLeod v Hamilton*, 254 Mich 653, 656-657; 236 NW 912 (1931), our Supreme Court recognized that an easement can be granted for a particular purpose only. The language used to indicate such a restriction is specific; in *MacLeod*, the deed stated that the easement was "for the construction of the said water course, ditch or drain and for no other purpose whatever …" *Id*. at 656. In such a case, abandonment of the purpose automatically extinguishes the easement. *Id*. Similarly, an easement can be automatically terminated if the deed conveying it contains a defeasance clause. In *Hickox v Chicago C S R Co*, 78 Mich 615; 44 NW 143 (1889), the deed which granted the easement stated that if the railway "should cease to be used and operated as a railroad, … the right of way granted thereunder shall terminate." Thus, the Supreme Court held that when the railroad operations ceased and the easement was used only to store cars, the defeasance clause operated to terminate the easement. *Id*. at 617.

Here, we believe that the phrase in the 1873 deed, "a right of way for the railroad of [the Mineral Range Railroad]," cannot be construed as a defeasance clause or as granting the easement for a particular purpose only. In making this determination, *Quinn* is instructive. The phrase is akin to a statement of purpose. The declaration that the easement was for the Mineral Range Railroad's construction of a railroad was "merely an expression of the intention of the parties that the deed is for a lawful purpose." *Quinn, supra* at 151. Thus, Soo Line's cessation of rail service and subsequent sale of the easement to be used for non-railroad purposes did not automatically extinguish the easement.[3]

The next question is whether the easement was terminated by some other means. Where an easement is created by grant, and there is no defeasance clause or restriction that it be used for a particular purpose only, it may be terminated by either adverse possession or abandonment. See *Strong v Detroit & Mackinac R Co*, 167 Mich App 562, 568; 423 NW2d 266 (1988). Neither party contends in this appeal that the easement was terminated by adverse possession.

To establish abandonment, there must have been an intent to relinquish the property and external acts which put that intention into effect. *Sparling Plastic Industries, Inc v Sparling*, 229 Mich App 704, 717-718; 583 NW2d 232 (1998), citing *Ludington & Northern R v Epworth Assembly*, 188 Mich App 25, 33; 468 NW2d 884 (1991). Nonuse alone is insufficient to prove

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[3] Defendant's reliance on *Jones v Van Bochove*, 103 Mich 98; 61 NW 342 (1894), and *Westman v Kiell*, 183 Mich App 489; 455 NW2d 45 (1990), to support its contrary position is misplaced. *Jones* did not hold that cessation of rail service automatically extinguished the easement. Rather, the Court determined that the easement had been abandoned, based on the plaintiff's predecessor in interest's actions and admission of its intent to abandon. *Id*. at 100-101.

Westman, supra, stands for the proposition that "a servient estate in a strip of land set aside for use as a railroad right of way reverts to the dominant estate from which it was carved upon abandonment of the right of way and passes with the conveyance of the dominant estate." *Id*. at 496. The trial court had determined that an easement was conveyed, "which was extinguished when the right of way was abandoned for railroad purposes." *Id*. at 492. However, this ruling was not appealed, nor did the appellate court address this issue. Thus, *Westman* cannot be read to support defendant's contention that the easement in this case was conveyed only for railroad purposes and terminated when it ceased to be used as such.

abandonment. *Strong, supra* at 569.

Defendant argues that Soo Line's request to cease its rail service, the subsequent ICC decision permitting it to do so, removal of the tracks, and the use of the word "abandoned" in its deed to plaintiff were affirmative acts which indicate Soo Line's intent to abandon the easement. We disagree.

As discussed above, because the easement in this case was not for a particular purpose only, mere non-use is insufficient to establish abandonment. *Strong, supra* at 569. Thus, it follows that cessation of rail service does not mean that the railroad intended to abandon its property interest in the easement. *Epworth Assembly, supra* at 34; *Strong, supra* at 569.

In regards to the ICC certificate of abandonment, the ICC only regulates and approves cessation of railroad operations, it "does not determine abandonment." *Vieux v East Bay Regional Park Dist*, 906 F2d 1330, 1339 (CA 9, 1990).[4] In this case, the ICC decision specifically recognized Soo Line's continuing property interest and prohibited it from removing the tracks for a period of 120 days from the date of the decision in case an interested party sought to acquire the easement and use the tracks.[5] Thus, we conclude that the ICC decision is not probative of Soo Line's intent to abandon its property interest in the easement.

Defendant asserts that *Cary* and *Strong* are distinguishable because in both cases, the railroad took steps which indicated its intent to retain its property interest. However, Soo Line's sale of the easement does indicate that it never intended to abandon its property rights in the easement after halting its railroad operations. It would be contradictory for Soo Line to have intentionally abandoned its property rights, yet afterwards proceed to sell these rights for value.

Removal of the tracks simply correlated to Soo Line's intent to cease its rail service and sell the property. There is no indication in the record as to when the tracks were removed, but they were in place at the time of plaintiff's last inspection in June 1986. Therefore, the only "action" taken by Soo Line after it ceased its railroad operations until at least mid-1986 was non-use. In *Strong, supra* at 569, the Court held that non-use was insufficient to find abandonment of the easement, even though the tracks had been removed thirty years earlier.

Lastly, defendant argues that the language in the deed which conveyed the easement to plaintiff proves that Soo Line acknowledged its abandonment. The 1988 quit claim deed used the phrase "abandoned railroad right-of-way" in describing the easement. We find that this was simply a description of the easement indicating that it was no longer used for railroad operation, comparable to the ICC's usage of the words. Further, this Court in *Strong, supra* at 569, concluded that the defendant's use of the word "abandoned" in a notice of its right of way, did

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[4] This citation is from *Cary Enterprises, et al* v *CSX Transportation, Inc, et al*, unpublished opinion per curiam of the Court of Appeals, issued July 29, 1997 (Docket No. 195528). While *Cary* has no precedential value, MCR 7.215(C)(1), we find that its reasoning, which was based on precedential case law, is sound and persuasive.

[5] Contrary to defendant's assertion, the decision did not mandate that a sale must occur within the 120-day period, only that the railroad could not make changes to the easement during this period.

not show an intention to abandon its property interest, but rather the term referred "only to the fact that [the defendant] was no longer using the right of way in its [railroad] operations."

We find no affirmative actions on the part of Soo Line to indicate that it intended to abandon its property interest in the easement, and, therefore, had a valid interest to convey to plaintiff. Accordingly, summary disposition in favor of plaintiff was proper.

Affirmed.

/s/ Michael R. Smolenski
/s/ Richard Allen Griffin
/s/ Peter D. O'Connell